


Roles and Responsibilities of the ZBA

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There is a huge amount to learn:

- Why does the ZBA exist?
- When is ZBA relief not required?
- Jurisdiction and Authority.
- Relationship to others.

Why is a ZBA established?

- RSA 673:1, IV, every zoning ordinance must include provision for a ZBA.
- Failure to include provision for a ZBA will render a zoning ordinance invalid.
 - Jaffrey v. Heffernan, 104 NH 249 (1962)

The ZBA Has No Legislative Powers

- Zoning ordinance or building code created by planning board, citizen petition, or governing body, and adopted by town meeting or the city or town council
- The Master Plan, Subdivision & Site Review regulations created by the Planning Board
- The ZBA takes these documents as they exist, and does not change them

The ZBA Has No Executive Powers

- Building permits and code decisions are issued by the Building Inspector or the Selectmen, not the ZBA
- Enforcement decisions made by administrative officials, not the ZBA
- Road classification decided by legislative body, not the ZBA

The ZBA is a Quasi-Judicial Body

- The ZBA collects **evidence**, finds the facts, and applies legal tests to determine if relief from the ordinance should be granted.
- It **interprets** the ordinance and has the final say on the *meaning* of the language.
- It **perfects** the ordinance through its power to **overrule or modify** decisions of administrative officials.

A constitutional “safety valve”

- The federal and state constitutions both prohibit the taking of private property for public use without just compensation.
 - US Const. 5th amd, NH Const. Pt. 1 Art 2 & 12
- The ZBA prevents the ordinance from unconstitutionally taking the economic value of land (“**inverse condemnation**”), through its variance and equitable waiver powers.

Jurisdiction

- RSA 674:33:
 - Administrative appeal
 - Variances, and special exceptions
- RSA 674:33-a: Equitable Waiver of Dimensional Requirements
- RSA 674:34: Building Code Appeals
- RSA 674:41: Class VI or private road

The Process of Adjudication

- Procedural due process is critical, ie. notice to all affected parties and an opportunity to be heard
- Applicants may not change their request for the type of relief during hearing; ie. A special exception cannot become a variance, due to notice issue

Adjudication

- Decisions are not to be made based upon the presence or absence of opposition, but solely on the **evidence**.
- The burden of proof is upon the **applicant**.
- The only board where a minimum of 3 “Yes” votes required to act, rather than a majority, See RSA 674:33, III.
- Decisions must be in writing, RSA 676:3.

When is ZBA Relief Not Needed? (Each of these a seminar in itself)

- **Non-conforming uses or structures** that predate the passage of the ordinance provision, ie. “grandfathering”.
- **Governmental uses** that do not conform to the ordinance, subject to RSA 674:54.
- The use is allowed because a federal or state law expressly or impliedly ***preempts*** the local ordinance.

Equitable Waiver of Dimensional Requirements

- A simple remedy for honest mistakes
- Dimensional only, not “use” violations
- A “waiver”, and does not create a non-conforming use
- Future changes must comply with zoning in effect at the time

Equitable Waiver, Elements

- 1. Violation not discovered until after substantial completion
- 2. A “good faith error”, by owner or building official, not ignorance, misrepresentation
- 3. Does not create a “public or private nuisance”
- 4. Cost of correction outweighs public benefit, and thus unfair.

Administrative Appeals

- To resolve claims of ***error*** in the decisions of:
 - “Administrative Officials” RSA 676:5, II (b)
 - Building Inspector or zoning official
 - Board of Selectmen
 - Planning Board, RSA 676:5, III
 - Historic District Commission, RSA 677:17

Administrative Appeals

- Administrative Officials, exception:
 - Cannot review “discretionary” acts, including refusal to take enforcement action
- Planning Board or HDC, exception:
 - Cannot review decisions involving “innovative land use control” issues

Special Exceptions, RSA 674:33, IV

- A use that is ***permitted*** by the ordinance, subject to additional criteria or standards
- Burden placed on the applicant to show that all of the additional criteria are met
- Runs with the land, but may be subject to conditions to prevent expansion or change, see Rye v. Ciborowski, 111 NH 77 (1971).

What is a Variance?

- A variance serves to exempt a property and its use from the application of the zoning ordinance;
- Cannot be granted unless **all five** elements are met;
- The relief “**runs with the land**”, not specific to the applicant.

The Five Elements

- No diminution in the value of surrounding properties
- Not contrary to the public interest;
- Owing to special conditions, a literal enforcement of the terms of the ordinance will result in unnecessary hardship;
- Spirit of the ordinance will be observed;
- Substantial justice will be done

Disability Exception

- A variance may be granted for reasonable accommodations necessary for a physically disabled person to use a property.
- The “hardship” element does not apply
- The variance may be limited to a person, and does **not** run with the land.
 - RSA 674:33, V

1. Public Interest

- Granting the variance will not do harm, meaning:
 - The use can't alter the essential character of the neighborhood; or
 - Threaten the public safety, health or welfare;
 - Applicant **not** required to show a public benefit.
- Gray v. Seidel, 143 NH 327(1999), & Chester Rod & Gun Club v. Chester 152 NH 577 (2005)

2. Spirit of the Ordinance

- How would this variance affect the ability to meet the purposes and goals of ordinance.
- Bacon v. Enfield, 150 NH 468 (2004): expanding a building to allow a heating system on one structure will not greatly affect a shoreland area, but adding more space on all similarly situated structures would be significant.

3. Value Not Diminished

- Expert opinion not required.
- Board members can accept or reject what they hear from the experts, and are free to consider their own knowledge and experience in the area.
Vannah v. Bedford, 111 NH 105 (1971)

4. Substantial Justice

- Will denial of relief cause a loss to the applicant that outweighs the gain to the public?
- An aspect of the constitutional requirement not to take property without just compensation

5. Unnecessary Hardship

- Former test: some aspect of the land itself means that literal enforcement of the ordinance would deny the owner all reasonable use of the property. *Grey Rocks Land Trust v. Hebron* (1992)
- So difficult to obtain that ordinances came close to an unconstitutional taking of property rights without compensation.

Simplex v. Newington, 2001-2004

- The old rule was abandoned, and became:
 - 1. Zoning restriction as applied interferes with reasonable use of the property
 - 2. No fair and substantial relationship between restriction and purpose of ordinance
 - 3. Variance would not injure the public or private rights of others

Boccia v. Portsmouth, 2004

- Court recognizes a distinction between limits on use of property, and restrictions arising out of area or dimensional standards
- Simplex remains the rule for **use** variances
- A new test is created for **area** variances

The Boccia “Area Variance” Test

- An area variance is needed to enable the use given the special conditions of the property
- The benefit sought by applicant cannot be achieved by some other method reasonably feasible, other than the area variance

And we return to “Special Conditions”

- While we focus on “hardship”, all 5 tests must be met before a variance may be granted, RSA 674:33, I (b).
- Even if the proposed use seems reasonable to applicant, there must be some special condition in the land that sets it apart from other land in the zone to support a variance. See Garrison v. Henniker (August 2, 2006).

Relationship to Other Boards

- An applicant may request the ZBA to hold a joint meetings with any other land use board on a pending matter.
 - RSA 676:2
- Implicit power to notify the Planning Board of ordinance language that is unclear or difficult to apply in practice. RSA 675:3, public hearings on ordinance changes.
- Relationship with the “Administrative Officials”

Relationship to the Public

- Duties to Applicants and Abutters:
 - Procedural due process, notice and the opportunity to be heard
 - Decide the matter on the evidence
- Developing a Record for Court review:
 - Take care to follow procedural requirements
 - Make detailed written findings of fact and rulings on legal questions, RSA 676:3

Conclusion

- Your service on this Board will be challenging, and at times difficult, but ultimately rewarding.
- All members need to remain current with state law, and changes in local ordinances
- Your role is to dispense justice, which means to be fair to all who come before you.